88-524 (1)

ORAL ARGUMENT REQUESTED

Supreme Court, U.S.
FILED
JUN 27 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

No.

ABNER COXSEY, JR. *Petitioner,*

VS.

EMPLOYERS MUTUAL CASUALTY CO.

Respondent.

PETITION FOR CERTIORARI

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

ATTORNEY FOR PETITIONER

5918

TO THE JUSTICES OF THE SUPREME COURT;

Petitioner, Abner Coxsey, Jr., files this his Petitiion for Certiorari, appealing the opinion of the Fifth Circuit filed March 30, 1988, and would show as follows:

QUESTIONS FOR REVIEW

1. DID THE FEDERAL COURT HAVE JURISDICTION TO RESTRAIN THE WORKMAN'S COMPENSATION CASE PENDING IN THE STATE DISTRICT COURT; IF THE FEDERAL COURT DID HAVE JURISDICTION, SHOULD THE STATE COURT PROCEEDINGS DURING THE JURISDICTIONAL TIME PERIOD BE VOIDED?

2. DID THE FEDERAL COURT ABUSE ITS DISCRETION IN GRANTING RULE 11 SANCTIONS WITHOUT A HEARING, I.E., DID THE FEDERAL COURT ACT AS A 'STAR CHAMBER' UNDER THE CIRCUMSTANCES?

PARTIES TO THIS PROCEEDING

The parties to this proceeding are Abner Coxsey, Jr. and Employers Mutual Casualty Company.

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LIST OF AUTHORITIES

CASES:

Aetna Insurance Company v. Hartshorn, 477 F. 2d 97.

Atlantic Coast Line R. Co. v. Brotherhocd of Locomotive Engineers, 398 U.S. 281, 26L, Ed. 2d 234 90 s. Ct. 1739(1970).

Browning Debenture Holders' Committee v. DASA Corp. 560 F. 2d 1078 (2 Circuit 1977).

Cleveland v. Ward, 116 TX 1, 285 S.W. 1063.

Donovan v. The City of Dallas, 84 S. Ct. 1979, 377 U.S. 408, 12 L. Ed. 2d 409.

Mathew v. Eldridge, 96 S. Cr. 893, 424 U.S. 319, 47 L. Ed. 2d 18.

Nemeroff v. Aberson, 620 F. 2d 339.

Saenz v. Sanders, 241 S.W. 2d, 316, (Tx. Civ. App.).

San Lorenzo Title Company v. City Mortgage Co., 124, TX 24,73 S.W. 2d 513.

Stewart v. Anderson, 70 TX 588, 8 S.W. 295.

Toughy v. Ragan, 340 U.S. 4462 (1951).

Thomas v. Capital Security Svcs., Inc., slip op. 1573 (5th Circuit 1988).

Tulof v. Eaton Corp. 695 S.W. 2d, 568 (Tex. 1983).

STATUTES:

28 USC Section 1 1442(a)(1)

28 USC Section 1294

28 USC Section 1331(b)

28 USC 2283

DR 7-101, Code of Professional Responsibility

CONSTITUTIONS:

U.S. Constitution, Fifth Amendment

U.S. Constitution, Sixth Amendment

Texas Constitution, Article 5, Section 6

Magna Carta 1215

RULES OF COURT:

Texas Rules of Civil Procedure, 166b(5)(b)

Federal Rules of Civil Procedure, Rule 11

Local Rule for Northern Dist. of TX, Rule 5.1(f)

REGULATIONS:

29 CFR, Section 2.2 et seq

TREATISE:

Wright, Law of Federal Courts

46 Am. Jur. 2d 727

43 Am. Jur. 2d, Section 753

12 Tx. Jur. 3rd, 728-739

12 Tx. Jur. 3rd, 733-734

LAW REVIEW ARTICLES:

5 Georgia Law Review 294

69 Harvard Law Review 180

32 U. of Chicago Law Review 471

54 Michigan Law Review 426

41 Virginia Law Review 815

50 Virginia Law Review 1404

31 Washington Law Review 39

OPINIONS BELOW

Petitioner appeals from the District Court's Order on Motion to Void Proceedings, its Order of July 23, 1987; the Fifth Circuit's Judgment, and its order denying the Petition for Rehearing of March 30, 1988.

JURISDICTION

Jurisdiction is grounded in 28 USC 1254. The Order on Motion to Void Proceedings and subsequent Orders culminating in the denial on Petition for Rehearing by the Fifth Circuit filed March 30, 1988.

PERTINENT LAW TO THE CASE

"...the rendition of a judgment without jurisdiction is a usurpation of power, and makes the judgment itself coram non judice, and ipso facto void." 46 Am. Jur. 2d 327

"...a party is allowed relief from a void

judgment because of lack of jurisdiction. Such a judgment is legally ineffective, or as is sometimes stated, a nullity." Williams v. North Carolina, 325 U.S. 226 (1949).

"Opportunity for a hearing required by due process must be given before the deprivation of a property interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". USCS Const. Amend. 14, Burnley V. Thompson, 524 F2d 1233. USCS Const. Amend. 5.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

STATMENT OF CASE

Shortly before this workman's

compensation case was to go trial, Respondent subpoened an OSHA representative for a deposition, which Respondent was noticed as being inappropriate; in spite of this notice, Respondent came into the Federal District Court with unclean hands and obtained a TRO from Federal Judge Fish 3 days before trial to prevent the case from going to trial. State District Judge Street expressed his displeasure with the Respondent about the TRO, and ordered the case to trial anyway, giving, sua sponte, a TRO of his own, enjoining the "United States of America, its agents, servants, and employees and attorneys, and all other persons..." from interferring with his jurisdiction. Coxsey lost his occupational disease claim from various heavy metal toxic effects even though the Respondent's expert, Dallas County

Medical Examiner Charles Petty said that the Petitioner had "an overload of aluminum" in his body. Coxsey attempted to appeal his case on a pauper's affidavit, which appeals to support his poverty state failed even at the Texas Supreme Court level. That Court was asked which way justice was oriented: Whether laws existed to keep the strong from always having its way as Cato expressed a couple of hundred years B.C. or as Llewelyn expressed in our time that laws exist to keep the ins in and to barricade the outs out.

During several appeals, no court would address the issue of jurisdiction, even though the learned judges were asked repeatedly this pivot question, regarding whether the Federal Court had

jurisdiction and at what time and basis. The Fish Court was asked to void the proceedings of Judge Street's Court if it indeed had jurisdiction over the workman's compensation case during the time that it went to trial. Judge Fish would not answer the jurisdictional issues posed and levyed $1500 as sanctions without a hearing. The Fifth Circuit upheld Judge Fish's Sanctions, and would not give a hearing for argument even though it was requested. The Fifth Circuit learned judges never addressed the issue of jurisdiction. Coxsey contends that the judgment of the state District Court be voided and that he be allowed a new trial for his heavy metal toxicities that has destroyed his health; that the asking for voiding of the proceedings was grounded in facts and law upon reasonable inquiry; that the

sanctions imposed for asking the jurisdictional questions were improper and are tantamount to a "Star Chamber" proceeding, which was banished by the Magna Carta in 1215, and whose principal has been affirmed by the U. S. Constitution, Amendment V.

BASIS FOR INITIAL JURISDICTION

This is the pivot point of this case. The Petitioner does not know if the Federal District Court ever had jurisidiction to enjoin the workman's compensatiuon case, and no learned judge to date has rendered an opinion . If the judges can't give a simple opinion, how they can they give sanctions on these same legal points to parties and their attorneys?

REASONS TO ALLOW THE WRIT

Coxsey wants a fair shake from the legal system, and does not want to be

intimidated or penalized for asking a Court simple questions such as jurisdiction and on what basis. If the Federal Court had jurisdiction, the State Court's judgment should be voided. To make an inquiry should not result in sanctions as this is based in law upon reasonable inquiry. To impose sanctions under these circumstances chills a party from redressing his wrongs and seeimgly violates the very basic principles in the U.S. Constitution as this case demonstrates a "Star Chamber" attitute and mental set from a party who has unclean hands from the onset and who is somehow able to finesse its wrongdoings to its advantage, aggravated by the impoverishment and health destruction and maiming of the Petitioner because of the heavy metal toxicity from 17 years of welding in improper ventitated areas.

Coxsey contends that the Courts have deteriorated into "Star Chambers" and the meaning of the U.S. Constitution is not availble to the poor and disenfranchised as they do not have the money to back up their rights.

Regarding Rule 17a, the Fifth Circuit seemingly has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision inasmuch as Rule 11 Sanctions, without a hearing or due process, is abhorrant to well established and reasoned law under the U.S. and State Constitutions.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY,

Petitioner,

v. Civil Action No. 3-86-1039-G

ALEX GIMBLE,

Respondent

MOTION TO VOID PROCEEDINGS IN THE 352ND DISTRICT COURT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Abner L. Coxsey, Jr., real party in interest, in the above styled and numbered cause, and requests this Honorable Court to void the 352nd District Court's proceedings, as the proceedings were done without jurisdiction, and in violation of this Honorable Court's temporary restraining order of April 18, 1986, and for grounds would show unto the Court as follows:

1. This Honorable Court entered a temporary restraining order to prevent the trial of the underlying Workman's Compensation suit scheduled to begin at 9:00 a.m. on April 21, 1986. In spite of the Court's temporary restraining order, the Honorable Judge Street of the 236th District Court in Fort Worth, initiated sua sponte an injunction order, restraining the Federal Courts, among others, from interferring with the Court's jurisdiction to try the case. It was set for trial that Monday morning, April 21, 1986, with Judge Street ordering the parties to trial.

2. Employers Mutual Casualty Company perfected an appeal to prevent a contempt action against itself and its attorneys for initiating additional proceedings in the Dallas Federal Court. Subsequently, the Second Court of appeals in Fort Worth

reversed the injunction order of the Trial Court, finding that it was an invalid attempt by the State Court to restraing the Federal Court's proceedings. A copy of this opinion is attached, as well as a Motion for Rehearing, and a Denial of the Rehearing. These documents will be self-explanatory, and are appended as Exhibits A, B, and C.

3. Coxsey, at the Appeals level, argued that, pursuant to the Supremacy Clause of the U.S. Constitution, that the judicial procedures at the trial level should be voided inasmuch as the State Court was under jurisdiction of the Federal District Court in Dallas, and was proceeding in spite of the restraining order, and therefore, all the judiciary proceedings that flowed from that should be voided.

4. Coxsey contends that the action and

statements at the trial level should be voided, as the Trial Court was without jurisdiction, in violating the temporary order by the Dallas Federal Court. This view is supported by the 46 Am. Jur. 2d at p. 327: "... the rendition of a judgment without jurisdiction is a usurpation of power, and makes the judgment itself coram non judice, and ipso facto void." This view is expanded under Section 753, 46 Am. Jur. 2d.

Accordingly, Abner Coxsey prays:

1. That this Honorable Court will review the documents appended, and

2. That this Honorable Court render an order voiding the judiciary proceedings of the 352nd Judicial Court that transpired during the time the temporary restraining order was in effect by the Dallas Federal Court, and

3. That this Honorable Court enter an

order to void all proceedings that took place during the pendancy of the temporary restraining order from the Dallas Federal Court.

4. For general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D.
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
Bar No. 05957750

CERTIFICATE OF SERVICE

This is to affirm that on this 8th day of November, 1986, a copy of the foregoing instrument was sent to W. Neil Rambin by regular mail, and Jack Ostrander, 525 Griffin Street, Suite 501, Dallas, Texas 75202.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY	*	
	*	
V.	*	CIVIL ACTION NO.
	*	CA-3-86-86-1039-G
	*	
ALEX GIMBLE	*	

ORDER ON MOTION TO VOID PROCEEDINGS

The Motion to Void Proceedings in the 352nd District Court is in all things DENIED.

The Court finds that said motion does not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law, and that this fact should have been known to counsel for the movant upon reasonable inquiry. Accordingly, the petitioner's Motion for Sanctions is hereby GRANTED. The Court finds that the petitioner has expended 12.50 hours of

attorney time in preparing its response and motion, and that the amount of time is reasonable under the circumstances. The Court further finds that $120.00 per hour is a reasonable hourly rate for petitioner's counsel in preparing its response and motion, taking into account the education, experience, ability, and reputation of said counsel, and that no adjustments to the "lodestar" figure of $1,500.00 are warranted on the basis of the other factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that petitioner Employers Mutual Casualty Company have and recover from Bernard J. Dolenz the sum of $1,500.00 as a sanction under Fed. R. Civ. P. 11, together with interest from and after the date of this order at the

rate of 6.30%, for all of which let execution issue if not timely paid.

A. JOE FISH
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY	*	
V.	*	CIVIL ACTION NO. CA-3-86-86-1039-G
ALEX GIMBLE	*	

MOTION TO RECONSIDER RULE 11 SANCTIONS

Abner L. Coxsey, Jr., and his attorney, move this Honorable Court to void the Rule 11 Sanctions imposed upon them June 16, 1987, and for reasons would show as follows:

BACKGROUND

1. Employers moved to restrain Plaintiff and his attorney from proceeding to trial, this Federal Court issued a Temporary Restraining Order on April 18, 1986, two days prior to this case going to trial.

2. The State Court, knowing of this Court's Temporary Restraining Order, rendered earlier the afternoon of April 18, 1986, denied the continuance that Employers had requested of the Court; additionally, the State Court ordered the case to trial April 21, 1986 as had been previously scheduled.

3. Employers filed a Motion of Contempt in Federal Court against the Plaintiff and attorney, even though the State Court on its own, at 8:00, April 21, 1986, enjoined Employers and the Plaintiff, and the attorneys, the United States of America, its agents, servants, and employees and attorneys from prosecuting, defending or participating in any way in any action in any Court, whether State or Federal, which would interfere in any way with the orderly trial of the State Court's case.

4. The Federal Motion of Contempt was not adjudicated.

5. The Plaintiff lost in the State Court trial. Most likely, if the Plaintiff had won, Employers would argue that the State Court verdict was voidable pursuant to the Federal Court's TRO.

REASONING FOR FILING MOTION TO VOID STATE COURT PROCEEDINGS

1. The Plaintiff's Motion to Void the State Court Proceedings was filed for SEVERAL purposes, important of which was to vacate the state trial, and hence to purge Plaintiff of contempt of the Federal Court.

2. If the State Court proceedings were voided (annulled), based upon the showing that Plaintiff and attorneys were forced to trial against their will, then this matter could be used defensively against

the pending, but never adjudicated Motion For Contempt. It would also have the effect of giving the Plaintiff a new trial.

3. Legal question: Can Rule 11 be used to penalize the litigant who raises novel arguments of defense in an action that is essentially penal in nature?

Does the imposition of Rule 11 costs against a criminal Defendant, or one so similarly situation, result in the deprivation of rights under the Fifth and Sixth Amendment of the United States Constitution?

28 USCA SECTION 2283

IS VAGUE AND INDEFINITE

SECTION 2283 says: "A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of

Congress, or where necessary in aid of its jurisdiction, or to protect or affectuate its judgments."

That this statute is vague and indefinite is given in Wrights "Federal Court", page 202 comments, Section 2283 is criticized there as being "not a model of clear draftsmanship", "has not resolved the problems of interpretation, but rather has generated new confusion", and does not have the virtue of "properly solving more more questions than it raises."

Section 2283 confusion has been the subject of several law review articles such as 32 U. CHI. L. Rev. 471, 69 Harv. L. Rev. 180, 41 Va. L. Rev. 815, 54 Mich. L. Rev. 426, 31 Wash. L. Rev. 39, 5 Ga. L. Rev. 294, and 50 Va. L. Rev. 1404.

This confusion is compounded in

attempting to determine who has jurisdiction, if it is limited, and for what period of time. If legal scholars and judges are confused, how can clarity and wisdom be imputed to Coxsey and his attorneys, particularly when this question was repeatedly asked of the Courts and with no clear answers forthcoming.

In Atlantic Coast Line R. Co. V. Brotherhood of Locomotive Engineers, 398 U.S. 281, 26L, Ed. 2d 234, 90 S. Ct. 1739 (1970), Supreme Court Justice Black discusses the history of Federal injunctions against state proceedings and indicates that there is "An absolute prohibition against enjoining State Court proceedings, unless the injunction falls within one of the three specifically defined exceptions."

Additionally, Atlantic Coast Line

indicates that "the prohibition against enjoining the State Court proceedings cannot be avoided by framing an injunction as a restraint on a party rather than directly on the State Court." The Atlantic Coast Line holding suggests that Coxsey's premise was not false, and that the Federal Court's TRO did run to the State Court, although indirectly.

Whether this Federal Court had jurisdiction is still unsettled law; and an argument, though novel, cannot be condemned as being frivolous. This is particularly true where the law is unsettled as can be gleened from the commentary of Wright's "Federal Court", page 202 and 203.

Coxsey and his attorney had repeatedly asked the question about jurisdiction of the Appeals Court and the Texas Supreme Court. The Appeals Court

indicating that the Federal Court proceedings were being restrained improperly quoting Donovan v. Dallas, but did not address the issue of jurisdiction in particular.

Donovan v. Dallas 377, U.S. 408, 12L Ed. 2d 409, 84 S Ct. 1579, says "...where the jurisdiction of a Court, and the right of the Plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceeding of another Court..." The State Appeals Court in its opinion suggests that jurisdiction had attached in the Federal Court. The Texas Supreme Court indicated it did not have jurisdiction.

The legal question then comes; Who had jurisdiction and at what time? If the State Appeals Court and the Texas Supreme Court suggest through their

rulings that they did not have jurisdiction, and that the Federal Court had jurisdiction, apparently on the prong "where necessary in aid of its jurisdiction".

If the Federal Court had jurisdiction that attached pursuant to Donovan v. Dallas as the Appeals Court suggests, the State Court did not have jurisdiction to order the Coxsey case to trial April 21 or to deny Employer's Motion For Continuance, having knowledge of the Federal Court's earlier TRO ruling.

If the State Court did not have jurisdiction, because of the valid TRO of the Federal Court, any proceeding should be voidable or annulled during the time while the Federal Court had jurisdiction.

RULE 11 WAS NOT INTENDED TO CHILL AN ATTORNEY'S ENTHUSIAM OR CREATIVITY

At the time of Employer's appeal, it was unclear whether the Federal Court had jurisdiction pursuant to Atlantic Coast Line and Judge Street's contention that he had to preserve his Court's jurisdiction pursuant to the Mandate of the Texas Constitution. Article 5, Section 8. It was Coxsey's contention that jurisdiction determination is usually Judge determined and that Coxsey and his attorneys were looking for enlightenment.

Even to this date, the jurisdictional issue is not clear as the Judges have not addressed this issue directly. The rulings suggest that the Federal Court had jurisdiction from the outset, but there is no clear reasoning as to why it attaches.

Making the assumption that the

Federal Court had jurisdiction at the onset for whatever reason, Coxsey and his attorney had to defend against the threat of Contempt and requested the Court that had jurisdiction to void the State Court's proceeding, as it was improper to have any proceeding begun in the first place.

RULE 11 SANCTIONS SHOULD REQUIRE A HEARING DUE TO DUE PROCESS

Since Rule 11 sanctions are penal in nature, due process requirements, pursuant to the Fifth Amendment of the United States Constitution, require that a notice and hearing should be given to satisfy the requirements of due process. This was not done in this particular case.

MOTION FOR RULE 11 SANCTIONS AGAINST EMPLOYERS

Employers wanted to take the deposition of OSHA's (Occupational Safety and Health Administration) representative, Mr. Alex Gimble, on the eve of trial, that is Mr. Gimble's deposition was to take place April 10, 1986, and the trial was scheduled for April 21, 1986. This would place Mr. Gimble in a posture of an expert whose deposition would have been less than 30 (thirty) days before the time of trial, and would violate Texas Rules of Civil Procedure, 166b(5)(b).

In addition, Employers knew that an OSHA representative would not be appropriately subpoenaed inasmuch as they had a certified copy showing the data that the OSHA representative had, and Employer's own in-house Industrial Hygenist, Mr. Dennis Lampert, could have interpreted the data.

Furthermore, even a closer examination would indicate that Mr. Alex Gimble as a complaint officer with OSHA would nto have to have his deposition taken in accordance with Department of Labor regulations, 29 C.F.R., Section 2.20 et. seq., and that Touhy v. Ragen, 340 U.S. 462, (1951), would back up such regulations, since such regulations are a legitimate exercise of the authority of a governmental agency to safeguard its records and the information contained therein.

This, in addition, would prevent governmental employees from constantly being at the Courthouse, which also would reflect on the parties to a lawsuit, since these representatives would take on the appearance of an expert.

In addition, Employers, at the time of trial, when Alex Gimble did appear

pursuant to Judge Street's enforcing Employers' subpoena on Alex Gimble, Employers, after all of the bru-ha-ha over the matter, DID NOT use him as a witness because Employers did not screen the facts carefully, and nor did it apply readily available existing law, and since after a two-year period of time, Employers in the eleventh hour tried to depose an OSHA representative, which smacked of delaying the trial, and served as a harassment tactic, Rule 11 sanctions should be imposed as this Court deems necessary and appropriate.

WHEREFORE, PREMISES CONSIDERED, Coxsey and his attorney prays:

1. That the Rule 11 Sanctions imposed against them be rescinded, and

2. That Rule 11 Sanctions be imposed against Employers, and

3. That the proceedings of the State

Court be voided, pursuant to earlier requests, and

4. For general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D.
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
Bar No. 05957750

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion To Reconsider Rule 11 Sanctions has been sent to P. Michael Jung, Strasburger & Price, 4300 InterFirst Plaza, 901 Main Street, LB 175, Dallas, Texas 75202 by regular mail this the 9th day of July, 1987.

Bernard J. Dolenz, J.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(FILED 7/23/87)

EMPLOYERS MUTUAL CASUALTY COMPANY	*	
V.	*	CIVIL ACTION NO. CA-3-86-86-1039-G
ALEX GIMBLE	*	

ORDER

The Motion to Reconsider Rule 11 Sanctions is in all things DENIED.

7/23/87

A. JOE FISH
United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1596

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff-Appellee,

versus

ALEX GIMBLE,

Defendant,

and

ABNER COXSEY, JR., and BERNARD J. DOLENZ,

Appellants.

Appeal from the United States District Court for the Northern District of Texas
(CA3-86-1039-G)
(March 3, 1988)

Before RUBIN and POLITZ, Circuit Judges, and SHAW, District Judge. * PER CURIAM:**

The judgment of the district court is AFFIRMED. Although it was reached before this court decided Thomas v.

Capital Security Services, Inc., slip op. 1573 (5th Cir. 1988) (en banc), it is fully consistent with the principles applied in that case.

* Hon. John M. Shaw, United States District Judge for the Western District of Louisiana, sitting by designation.

NO. 87-1596

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

ABNER COXSEY, JR.,

Appellant

V.

EMPLOYERS MUTUAL CASUALTY CO.,

Appellee.

MOTION FOR RE-HEARING

Appeal from Civil Action No. 3-86-1039-G, U.S. District Court, No. District of Tx, Dallas Division

---

Bernard Dolenz, J.D., M.D.

6102 Swiss Avenue

Dallas, Texas 75214

Tx. Bar Card 05957750

ATTORNEY FOR APPELLANT

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES, Abner Coxsey, Jr., Appellant, and his attorney, Bernard J. Dolenz, and requests the panel to re-hear the Points of Issue for review in this case for the following reasons:

POINT ONE:

THE APPEAL COURT ERRED AS IT USED THE PRINCIPALS IN THOMAS V. CAPITAL SECURITY SERVICES, INC., slip op. 1573 (5th Cir. 1988) (en banc), AS THIS OPINION USES CRITERIA FOR RULE 11 SANCTIONS AFTER THE TIME OF THE SANCTIONS.

In spite of various Circuit Court rulings, Rule 11 Sanctions are more dependent on the biases and background of the Judge than any other criteria given

as guidelines AT THE TIME OF the sanctions imposed by the Fish Court. THOMAS addresses this in footnote on page 9 ..." (3) when faced with an identical set of facts, federal judges are in disagreement as to whether or not a Rule 11 violation has occurred..."

POINT TWO:

THE APPEAL COURT ERRED AS THE LAW REGARDING RULE 11 SANCTIONS WAS UNSETTLED AT THE TIME OF SANCTIONS BEING GIVEN ON COXSEY'S ATTORNEY.

In this regard, THOMAS on page one of its opinion affirms this by stating ..." this Court took the instant case en banc to resolve any inconsistencies between previous opinions in this Circuit regarding procedures and standards for the imposition of sanctions under Rule

11, as amended in 1983"; and on page nine states ..."Rule 11 decisions by Courts have not always been consistent, producing confusion among the bench and bar, as well as inequitable results".

POINT THREE:

THE APPEAL COURT ERRED IN AFFIRMING THE FISH COURT AS ALL RULE 11 DECISIONS MUST BE SUPPORTED BY SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE DISTRICT COURT.

In this regard, THOMAS affirms this principal on pages 38 and 39. In the Fish Order, the statements made "The Court finds that said motion does not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law, and that this fact should have been

known to counsel for the movant upon reasonable inquiry..." do not give specific findings of fact and conclusions of law, but are merely the Court's mental set.

Coxsey's attorney contends that he was not in violation of any Rule 11 criteria as he had asked this Court to render an opinion regarding jurisdiction as this has been the gravamen of this case from the onset, and which all the Judges to date have side-stepped this paramount issue, including this court.

Contrary to Mr. Junt's appellee's argument, which Coxsey's attorney views as being repleat with many misstatements and distortions, the Fort Worth Court of Appeals was asked to render an opinion on whether or not the Federal Court had jurisdiction, and if it did, to void the proceeding that took place at the trial

level, since it would have been without jurisdiction, and therefore, the judgment rendered in the Trial Court would be void. 46 Am Jur. 2d at p. 327 and this view is further expanded under Section 753, 46 Am Jur. 2d.

If the jurisdictional issue is unclear to scholars such as Wright's "Federal Court" discussion on pages 202 and 203, and confusion regarding jurisdiction being the subject of several law review articles, the Honorable Judge Street's view that he could enjoin the Federal Courts and its agents from placing an injunction on his Court indirectly by enjoining the parties, and the Judges who have heard the jurisdictional argument who have side-stepped this crucial issue of jurisdiction, how then can this Court hold Coxsey's attorney to knowledge about which there is no enlightenment? Coxsey's

attorney is not endowed with omniscience and is still looking for enlightenment from the scholarship of this Court regarding the issue of jurisdiction. Regarding the issue of jurisdiction, ATLANTIC COAST LINE R. CO., V. BROTHERHOOD OF LOCOMOTIVE ENGINEERS, 398 U.S. 281, 26L, Ed. 2d 234, 90 S. CT. 1739 91970), indicates that "the prohibition against enjoining the State Court proceedings cannot be avoided by framing an injunction as a restrain on a party rather than directly on the State Court". It would appear that Judge Street's conduct has caused grief to Coxsey and his attorney, if in fact Judge Street did not have jurisdiction. Should Coxsey's attorney be penalized for the conduct of Judge Street? Seemingly two judges are fighting about jurisdiction with no answers being given on who has it by the

higher courts, with the hostility and penalties being imposed upon the lawyers who are trying to do their best for their clients.

POINT FOUR:

THE APPEALS COURT ERRED AS ITS RULING WILL TEND TO CHILL AN ATTORNEY"S ENTHUSIASM OR CREATIVITY.

In this regard, the motion to void proceedings was based upon several conversations with area attorneys about this approach, since there was some question as to whether the Fish Court did have jurisdiction. The motion was made after several Appeals Court proceedings had taken place, as some of the proceedings in these Courts would have cured the problem had the judges answered the questions posed to them about

jurisdiction.

THOMAS, on page 25, discusses the chilling effect of an attorney's enthusiasm or creativity in pursuing factual or legal theories. If an attorney as a duty to represent his client diligently, he is impeded from doing so because of the chilling effect of Rule 11 sanctions which seemingly can be imposed on the biases and background of the sitting judge. It appears that the bar is already suffering from the confusion regarding Rule 11 and it is doubtful that THOMAS would do much to help as this case law will also be subject to the biases and background of the Federal Judges who review it.

POINT FIVE:

THE APPEALS COURT ERRED INASMUCH AS SANCTIONS SHOULD BE EDUCATION AND

REHABILITATIVE IN CHARACTER.

This view is expressed in THOMAS, page 27. The current opinion provides neither education nor insight into why sanctions were imposed in the first place because of raising the jurisdictional issues. The logic of asking for a finding on jurisdiction is the underpining for the probability of a new trial, and is based in law as given above, as a court without jurisdiction has no binding effect. Coxsey's attorney is again asking this Court to give its analysis on the jurisdictional issue and thereby educate him and his associates as to the scholarship and enlightened thinking of the Fifth Circuit.

POINT SIX:

THE APPEALS COURT ERRED IN NOT RULING ON DUE PROCESS CONSIDERATIONS AS THE RULE 11

SANCTION WAS A PENALTY GIVEN WITHOUT A HEARING.

This is partially in THOMAS on page 29, and is a real consideration when Rule 11 Sanctions are used to penalize a litigant who raises novel arguments of defense in an action that could essentially be penal in nature since a potential contempt could have been imposed upon Coxsey and his attorney had the Federal Court had jurisdiction. The motion to void proceedings was to vacate the state trial and also to purge the Plaintiff of possible contempt.

If the State Court proceedings were annulled based upon the showing that Plaintiff and attorney were forced to trial against their will, then this matter could be used defensively against the pending, but never adjudicated Motion for Contempt. It would also have the

effect of giving the Plaintiff a new trial. Does the imposition of Rule 11 costs against a criminal Defendant, or one so similarly situated, result in the deprivation of rights under the Fifth and Sixth Amendments of the United States Constitution?

Since Rule 11 Sanctions seem penal in nature, due process requirements, pursuant to the Fifth Amendment of the United States Constitution, require that a notice and hearing should be given to satisfy the requirements of due process. This was not done in this particular case.

POINT SEVEN:

THE APPEALS COURT ERRED IN AFFIRMING THE TRIAL COURT'S OPINION AS THE APPELLEE, EMPLOYERS MUTUAL CASUALTY COMPANY, HAS

UNCLEAN HANDS.

In this regard, in the eleventh hour, wanted to take the deposition of OSHA's representative, Mr. Alex Gimble. He was designated neither as a fact or expert witness, and would have placed Mr. Gimble in the posture of an expert, and would have violated Texas Rules of Civil Procedure, 166b. The attorneys for Employers knew, or should have known, that his deposition could not have been taken pursuant to Department of Labor regulations, 29 et seq, and Touchy v. Ragen, 340 U.S. 4462 (1951).

These procedures involving Gimble were done in bad faith, and were caused to delay the trial and to increase the cost of litigation. Employrs motions before Judge Fish's court were not well grounded in fact or warranted by existing law.

How the attorneys for Employers were able

to finnese their inequitable behavior into a Rule 11 Sanction against Coxsey and his attorney, still remains a mystery, although it is apparent from Appellee's brief, that the attorney served as a law clerk to Judge Patrick Higginbotham. While the Appellant is not suggesting a connection, the Appellant is still troubled by the lack of the Court's jurisdictional analysis, and by apparently being blinded to the request asked of the Court regarding the jurisdictional matters.

POINT EIGHT:

THE APPEALS COURT ERRED IN NOT PUBLISHING ITS OPINION.

This opinion should be published as it is of such importance to the jurisprudence of the Fifth Circuit as to require

analysis. The issues involved in the underlying case will affect persons or entities beyond the named litigants as this is a case in which an attorney is given Rule 11 Sanctions without a hearing.

The Appellant contends that these rulings are of such erroneous consequence, that if permitted to stand, would constitute a serious departure from the established law or would introduce a doctrine violative of fundamental principals. DECKER V. KIRLICKS, 216 S.W. 385 (Tex. 1919).

Since an unpublished opinion cannot be used as authority by the Bench or Bar, it has no STARE DECISIS value. Tex. R. App., p. 90(i), BULLOCK V. SAGE ENERGY CO., 728 S.W. 2d 465, (Tex. App. - Austin 1987 writ ref'd n.r.e.

Public policy favors publishing all

judiciary proceedings and the Appeals Court should not shield itself from review by electing not to publish an opinion.

The opinion should be published as any time an attorney is given sanctions by the Court on without a hearing, the Bar should be aware of it so as to be on fornotice and for the reasoning of the Court for such sanctions.

PRAYER

Coxsey requests of this Court that it reverse the judgment of the District Court, given an opinion as to jurisdiction, and render an order voiding the judiciary proceedings of the 352nd Judicial Court if this Court views that a valid TRO order was in effect by the Dallas Federal Court.

Alternatively, that this Court find that the Honorable Judge Fish did not have jurisdiction to grant the initial TRO, and that all orders given by the Fish Court be considered null and void, for costs of court, and for general relief.

Respectfully submitted,

Bernard J. Dolenz

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Filed 3-30-88)

No. 87-1596

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff-Appellee,

versus

ALEX GIMBLE,

Defendant,

and

ABNER COXSEY, JR., and BERNARD J. DOLENZ,

Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(March 30, 1988)

Before RUBIN and POLITZ, Circuit Judges, and SHAW, District Judge. * PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED. At the request of the petitioner, the opinion is to be published.

ENERED FOR THE COURT:

/s/ ALVIN B. RUBIN
UNITED STATES CIRCUIT JUDGE

* Hon. John M. Shaw, United States District Judge for the Western District of Louisiana, sitting by designation.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail to Neil Rambin and P. Michael June, 4300 InterFirst Plaza, 901 Main Street, LB 175, Dallas, Texas 75202 on this ___ day of September, 1988.

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